

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

11 Esteban Juan Price,)
12 Petitioner,) CV-11-47-TUC-CKJ (JCG)
13 vs.) **REPORT & RECOMMENDATION**
14 Charles L. Ryan, et al.,)
15 Respondents.)
16 _____)

18 Petitioner, Esteban Juan Price, who is presently confined in the Gila Unit of the
19 Arizona State Prison Complex in Douglas, Arizona, has filed a Petition for Writ of Habeas
20 Corpus pursuant to 28 U.S.C. § 2254. Before the Court are the Petition for Writ of Habeas
21 Corpus (“Petition”) (Doc. No. 1) and Respondents’ Answer (“Answer”). (Doc. No. 9.) No
22 Reply was filed. Pursuant to the Rules of Practice of this Court, this matter was referred to
23 Magistrate Judge Guerin for Report and Recommendation. The Magistrate Judge
24 recommends that the District Court deny the Petition.

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26 **FACTUAL AND PROCEDURAL BACKGROUND**
27 According to the Arizona Court of Appeals, the facts giving rise to Petitioner’s
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conviction are as follows:¹ On August 22, 2008, while driving his vehicle, Petitioner had an altercation with passengers in a nearby car. Petitioner followed the vehicle into a parking lot, where he beat one of the occupants of the vehicle with a revolver and took the victim's gold chain necklace. The passenger in Petitioner's vehicle brandished a shotgun during the attack. Petitioner and his passenger then fled to a nearby apartment complex, where they were later arrested. Police later discovered Petitioner's vehicle with a revolver and shotgun inside. Petitioner told police that he had loaned his vehicle to two other individuals earlier in the day. (Answer, Ex. A.)

9 Following a jury trial, Petitioner was convicted on three counts of aggravated assault
10 and sentenced to concurrent, presumptive, 7.5-year prison terms for each count. (*Id.*)
11 Petitioner appealed his conviction, arguing: (1) the trial court erred in permitting the state to
12 introduce a photograph into evidence in violation of Petitioner’s rights to timely disclosure
13 and in violation of the Arizona Rules of Evidence; (2) the trial court erred in permitting
14 hearsay statements to be admitted at trial in violation of Petitioner’s Constitutional right to
15 confront his accusers; and (3) the trial court improperly imposed a \$20 time payment fee.
16 The Court of Appeals affirmed Petitioner’s convictions for aggravated assault, vacated the
17 time payment fee and affirmed Petitioner’s sentences as modified. (Answer, Ex. A.)
18 Petitioner did not petition for review. (Answer, Ex. B.)

On August 9, 2010, Petitioner filed a Petition for Post-Conviction Relief pursuant to Rule 32, Ariz. R. Crim. P. (“Rule 32 Petition”) in which he argued that he received ineffective assistance of counsel when his trial counsel (a) failed to interview a potential witness and (b) failed to object to the court’s denial of Petitioner’s motion for mistrial.²

²⁴ 1 Pursuant to 28 U.S.C. § 2254(e)(1), “a determination of a factual issue made by a state
25 court shall be presumed to be correct.”

26 ²Respondents failed to include Petitioner's post-conviction relief proceedings in the
27 Procedural Background Section of their Answer although the post-conviction filings are attached
as Exhibits and discussed generally in the Timeliness Section.

1 (Answer, Ex. F.) The trial court denied Petitioner's Rule 32 Petition on December 3, 2010.

2 (Answer, Ex. D.) Petitioner did not file a petition for review.

3 On January 18, 2011, Petitioner filed the instant habeas petition, in which he raises
4 four claims:

5 **Ground 1:** The trial court erred in permitting the state to introduce a photograph into
6 evidence in violation of Petitioner's rights to timely disclosure and in violation of the
7 Arizona Rules of Evidence.

8 **Ground 2:** The trial court erred in permitting hearsay statements to be admitted at
9 trial in violation of Petitioner's Constitutional right to confront his accusers.

10 **Ground 3:** Petitioner received ineffective assistance of counsel when trial counsel:
11 (a) failed to interview a potential witness; (b) failed to object to the court's denial of
12 Petitioner's motion for mistrial; and (c) failed to bring forward evidence of innocence.

13 **Ground 4:** Petitioner was denied due process when the trial court failed to grant his
14 motion to dismiss or to remand the indictment to the grand jury.

DISCUSSION

16 The Magistrate Judge recommends that the Petition be denied. Ground 1 fails to state
17 a cognizable claim. Grounds 3 and 4 are not exhausted. Ground 2 is without merit.

A. Non-Cognizable Claim

19 In Ground 1, Petitioner claims that the trial court erred in permitting the state to
20 introduce a photograph into evidence in violation of Petitioner's rights to timely disclosure
21 and in violation of the Rules of Evidence. Petitioner does not assert a violation of federal law
22 with respect to Ground 1. Because 28 U.S.C. § 2254 permits the Court to entertain a Petition
23 for Writ of Habeas Corpus "only on the ground that he is in custody in violation of the
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1 Constitution or laws or treaties of the United States," and because Ground 1 alleges only a
 2 violation of Arizona law, Ground 1 fails to state a cognizable claim.³

3 **B. Exhaustion**

4 **i. Legal Standard**

5 Ordinarily, before a federal court will consider the merits of a habeas petition, the
 6 petitioner must exhaust the remedies available to him in state court. 28 U.S.C.
 7 §2254(b)(1)(A); *Picard v. Connor*, 404 U.S. 270, 275 (1971). First enunciated in *Ex parte*
 8 *Royall*, 117 U.S. 241 (1886), the exhaustion requirement is designed "not to create a
 9 procedural hurdle on the path to federal habeas court, but to channel claims into an
 10 appropriate forum, where meritorious claims may be vindicated and unfounded litigation
 11 obviated before resort to federal court." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992).
 12 The requirement is grounded in principles of comity, and reflects a desire to protect state
 13 courts' role in the enforcement of federal law. *Castille v. Peoples*, 489 U.S. 346, 349 (1989)
 14 (citation omitted). The requirement is also based on a pragmatic consideration that fully
 15 exhausted claims will usually be accompanied by a complete factual record once they reach
 16 federal court. *Rose v. Lundy*, 455 U.S. 509, 519 (1982).

17 A petitioner must exhaust his claims by fairly presenting them to the state's highest
 18 court, either through a direct appeal or collateral proceedings, before a federal court will
 19 consider the merits of habeas corpus claims pursuant to 28 U.S.C. § 2254. See *Rose*, 455
 20 U.S. at 519. A petitioner must have also presented his claim in a procedural context in which
 21 its merits will be considered. See *Castille*, 489 U.S. at 351. A habeas petitioner's claims may

23 ³ In addition, Petitioner failed to present Ground 1 as a federal claim in his appeal, and thus
 24 it is also barred on fair presentation grounds. To properly exhaust state remedies, the petitioner must
 25 "fairly present" his claims to the state's highest court in a procedurally appropriate manner.
O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999). A claim is "fairly presented" if the petitioner has
 26 described the operative facts and the federal legal theory on which his claim is based so that the state
 27 courts have a fair opportunity to apply controlling legal principles to the facts bearing upon his
 constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270,
 277-78 (1971).

1 be precluded from federal review on exhaustion grounds in either of two ways. First, a claim
 2 may be procedurally defaulted in federal court if it was actually raised in state court but
 3 found by that court to be defaulted on state procedural grounds. *See Coleman v. Thompson*,
 4 501 U.S. 722, 729-30 (1991). Second, the claim may be procedurally defaulted in federal
 5 court if the petitioner failed to present the claim in a necessary state court and "the court to
 6 which the petitioner would be required to present his claims in order to meet the exhaustion
 7 requirement would now find the claims procedurally barred." *Id.* at 735 n.1. If a petitioner
 8 has procedurally defaulted a claim in state court, a federal court will not review the claim
 9 unless the petitioner shows "cause and prejudice" for the failure to present the constitutional
 10 issue to the state court, or makes a colorable showing of actual innocence. *See Gray v.*
 11 *Netherland*, 518 U.S. 152, 162 (1996); *Sawyer v. Whitley*, 505 U.S. 333, 337 (1992); *Murray*
 12 *v. Carrier*, 477 U.S. 478, 485 (1986).

13 **ii. Petitioner failed to exhaust Grounds 3 and 4**

14 Petitioner did not present Ground 3(c) or Ground 4 in his direct appeal or his Rule 32
 15 Petition. Petitioner presented Grounds 3(a) and 3(b) in his Rule 32 Petition but did not
 16 petition for review of the trial court's denial of his Rule 32 Petition. Consequently,
 17 Petitioner has not fairly presented Grounds 3 or 4 and cannot raise those claims for the first
 18 time in federal court. *See Rose*, 455 U.S. at 519 (stating that a petitioner must exhaust his
 19 claims by fairly presenting them to the state's highest court, either through a direct appeal or
 20 collateral proceedings, before a federal court will consider the merits of habeas corpus claims
 21 pursuant to 28 U.S.C. § 2254). Petitioner is now precluded by Arizona Rules of Criminal
 22 Procedure 32.2(a)(3) and 32.4 from obtaining relief on Ground 3 or 4 in state court absent
 23 an applicable exception, which Petitioner does not assert. *See Ariz. R. Crim. P.* 32.2(b);
 24 32.1(d)-(h). Thus, Grounds 3 and 4 are technically exhausted but procedurally defaulted,
 25 absent a showing of cause and prejudice or a fundamental miscarriage of justice.

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1 **iii. Petitioner has not demonstrated cause and prejudice or made a colorable
2 showing of actual innocence.**

3 A federal court may only grant review of a procedurally defaulted claim if petitioner
4 makes a showing of cause and prejudice, *Netherland*, 518 U.S. at 162, or a colorable
5 showing of actual innocence amounting to a “fundamental miscarriage of justice.” *Sawyer*
6 *v. Whitley*, 505 U.S. 333, 336 (1992). To establish cause for a procedural default, a petitioner
7 must show an external impediment which rendered Petitioner unable to comply with the
8 procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To show prejudice, the
9 petitioner bears the burden of demonstrating that the error worked to his substantial
10 disadvantage, infecting the entire trial with constitutional error. *Carrier*, 477 U.S. at 488. If
11 petitioner cannot meet one of the requirements, it is unnecessary for federal courts to address
12 the other requirement. *United States v. Frady*, 456 U.S. 152, 168 (1982). Petitioner may also
13 be granted federal review if he can demonstrate a fundamental miscarriage of justice. A
14 fundamental miscarriage of justice results when the petitioner can demonstrate that a
15 constitutional error caused the conviction of one who is actually innocent. *Carrier*, 477 U.S.
16 at 496.

17 Petitioner contends that his failure to properly exhaust his claims should be excused
18 with respect to Ground 3 because he did not know that he needed to file a petition for review
19 of the trial court’s denial of his Rule 32 Petition in order to properly exhaust the claims raised
20 therein. A lack of legal knowledge is insufficient to meet the “cause” standard. *See Hughes*
21 *v. Idaho State Bd. of Corrections*, 800 F.2d 905, 909 (9th Cir.1986) (finding that an illiterate
22 pro se petitioner’s complete lack of legal assistance is not cause to excuse a procedural
23 default); *see also Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004) (ignorance of the law
24 and procedural requirements for filing a timely notice of appeal is insufficient to establish
25 cause to excuse procedural default). Accordingly, Grounds 3 and 4 were not properly
26 exhausted and the Court need not consider the merits of those claims.

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1 **v. Exhausted claims**

2 Petitioner properly exhausted Ground 2 by fairly presenting it in his direct appeal.
3 Accordingly, the Court will consider the merits of this claim.

4 **C. Merits**

5 **i. Legal Standard**

6 On habeas review, a state court's findings of fact are entitled to a presumption of
7 correctness when fairly supported by the record. *Wainwright v. Witt*, 469 U.S. 412, 426
8 (1985). The presumption of correctness also applies to a state appellate court's findings of
9 fact. *Sumner v. Mata*, 449 U.S. 539, 546 (1981). The question presented in a state prisoner's
10 petition for a writ of habeas corpus is "whether the state proceedings satisfied due process."
11 *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991).

12 Federal courts may entertain a state prisoner's petition for habeas relief only on the
13 grounds that the prisoner's confinement violates the Constitution, laws, or treaties of the
14 United States. *Reed v. Farley*, 512 U.S. 339 (1994). General improprieties occurring in state
15 proceedings are cognizable only if they resulted in fundamental unfairness and consequently
16 violated the petitioner's Fourteenth Amendment right to due process. *Estelle v. McGuire*,
17 502 U.S. 62, 67-68 (1991)(“[I]t is not the province of a federal habeas court to reexamine
18 state court determinations on state law questions.”); *Bonin*, 77 F.3d at 1158. The Supreme
19 Court has held in the habeas context that "this Court will not review a question of federal law
20 decided by a state court if the decision of that court rests on a state law ground that is
21 independent of the federal question and adequate to support the judgment." *Coleman v.
22 Thompson*, 501 U.S. 722, 729 (1991). The provisions of the Anti-Terrorism and Effective
23 Death Penalty Act (AEDPA) govern this case and pose special burdens. *Chein v. Shumsky*,
24 373 F.3d 978, 983 (9th Cir. 2004) (en banc). Under AEDPA, when reviewing a state
25 criminal conviction, a federal court may grant a writ of habeas corpus only if a state court
26 proceeding "(1) resulted in a decision that was contrary to, or involved an unreasonable
27 application of, clearly established Federal law, as determined by the Supreme Court of the

1 United States; or (2) resulted in a decision that was based on an unreasonable determination
2 of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §
3 2254(d).

4 Under § 2254(d)(1), a state court decision is "contrary to" clearly established Supreme
5 Court precedent "if the state court applies a rule that contradicts the governing law set forth" in Supreme Court cases or "if the state court confronts a set of facts that are materially
6 indistinguishable from" a Supreme Court decision but "nevertheless arrives at a result
7 different from" that precedent. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state
8 court decision is an unreasonable application of clearly established federal law if "the state
9 court identifies the correct governing legal principle" from a Supreme Court decision "but
10 unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. In
11 considering whether a state court has unreasonably applied Supreme Court precedent, "a
12 federal habeas court may not issue the writ simply because that court concludes in its
13 independent judgment that the relevant state-court decision applied clearly established
14 federal law erroneously or incorrectly. Rather, that application must also be unreasonable."
15 *Id.* at 411; *Bell v. Cone*, 535 U.S. 685, 694 (2002). In conducting habeas review, we
16 "presum[e] that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19,
17 24 (2002).

19 **ii. Ground 2**

20 In Ground 2, Petitioner contends that the trial court erred in permitting hearsay
21 statements to be admitted at trial in violation of Petitioner's Constitutional right to confront
22 his accusers. When applying the AEDPA and reviewing whether a state court decision is
23 contrary to federal law, this court must look to the state's last reasoned decision as the basis
24 for its judgment. *See Avila v. Galaza*, 297 F.3d 911, 918 & n. 6 (9th Cir. 2002). Thus, this
25 Court must consider whether the Court of Appeals' decision involved an unreasonable
26 application of clearly established federal law or was based on an unreasonable determination
27 of the facts in light of the evidence presented in the State court proceeding.

1 Ground 2 centers around the out-of-court statements of "F," who called 911 upon
2 witnessing Petitioner attack the victim and who was later interviewed telephonically by a
3 police officer. (Answer, Ex. A.) When called to testify, F claimed he did not remember the
4 event. (*Id.*) A tape recording of the 911 call was played during F's testimony, but F
5 maintained he could not remember the incident. (*Id.*) After F testified, the police officer
6 testified about the statements F had made during the telephonic interview. (*Id.*) Petitioner
7 claims that the trial court violated his right to confront his accusers by "permitting [F's]
8 hearsay statements through Officer Miller." (Doc. 1, p. 2.)

9 The Court of Appeals rejected Petitioner's confrontation claim, citing cases allowing
10 the introduction of a witness' prior statements where the witness feigned lack of recollection
11 or gave prior inconsistent statements. The Court of Appeals pointed out that, after the police
12 officer's testimony, Petitioner could have called F back to the stand to be cross-examined
13 regarding the telephonic interview, but that he failed to do so. The Court of Appeals
14 concluded that the Petitioner had waived his right to cross-examine and cited cases from the
15 Fifth, Seventh and Tenth Circuits in support.

16 The Court of Appeals decision was neither an unreasonable application of clearly
17 established federal law nor based on an unreasonable determination of the facts in light of
18 the evidence presented. The Confrontation Clause of the Sixth Amendment gives the
19 accused the right "to be confronted with the witnesses against him." However, "the
20 Confrontation Clause includes no guarantee that every witness called by the prosecution will
21 refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the
22 contrary, the Confrontation Clause is generally satisfied when the defense is given a full and
23 fair opportunity to probe and expose these infirmities through cross-examination, thereby
24 calling to the attention of the factfinder the reasons for giving scant weight to the witness'
25 testimony." *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985). In the present case,
26 Defendant effectively waived his right to cross-examine F when he failed to call F back to
27 the stand; there is nothing in the record to suggest that Defendant was precluded from making
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such a request. Moreover, the Confrontation Clause is not implicated by the introduction of an out-of-court identification where, as here, “the hearsay declarant is present at trial and subject to unrestricted cross-examination. In that situation . . . the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements.” *See United States v. Owens*, 484 U.S. 554, 560 (1988). Accordingly, Ground 2 is without merit.

CONCLUSION

8 Based on the foregoing, the Magistrate Judge recommends that the District Court enter
9 an order DENYING the Petition for Writ of Habeas Corpus.

Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections within fourteen (14) days of being served with a copy of the Report and Recommendation. If objections are not timely filed, they may be deemed waived. If objections are filed, the parties should use the following case number: **CV-11-47-TUC-CKJ**.

14 The Clerk is directed to mail a copy of the Report and Recommendation to Petitioner
15 and counsel for Respondents.

16 || DATED this 9th day of June, 2011.



Jennifer C. Guerin
United States Magistrate Judge